SUPREME COURT, U. S.

In the Supreme Court of the United States

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OCTOBER TERM, 1973

No. 73-91

CHEVRON OIL COMPANY, WESTERN DIVISION; AMERADA HESS CORPORATION; EXXON CORPORATION; MARATHON OIL COMPANY; and TEXACO INC.,

Petitioners,

vs.

FEDERAL POWER COMMISSION; PHILLIPS PETROLEUM COMPANY, a Delaware corporation; ATLANTIC RICHFIELD COMPANY; BELCO PETROLEUM CORPORATION; BETA DEVELOPMENT COMPANY; CONTINENTAL OIL COMPANY; GULF OIL CORPORATION; HIGH CREST OILS, INC.; SKELLY OIL COMPANY; SUN OIL COMPANY; TENNECO OIL COMPANY; UNION OIL COMPANY OF CALIFORNIA; THE STATE OF NEW MEXICO; FOUR CORNERS GAS PRODUCERS ASSOCIATION; UNITED DISTRIBUTION COMPANIES; EL PASO NATURAL GAS COMPANY; PUBCO PETROLEUM CORPORATION; SOUTHERN CALIFORNIA GAS COMPANY; AZTEC OIL & GAS COMPANY; AND SHELL OIL COMPANY,

Respondents.

Reply Brief

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Reply Brief

The Brief for the Federal Power Commission in Opposition attempts to evade the issue which the decision below and the *Mobil* decision[1] have placed squarely before this

1. *Mobil Oil Corporation v. Federal Power Commission* (D.C. App. 1973) 483 F.2d 1238; see Supplemental Brief in Support of Petition for a Writ of Certiorari.

Court—an issue involving the most significant assault upon accepted due-process procedures in the history of administrative regulation of rates in the petroleum industry.

It is impossible to accept the argument that the decision below and *Mobil* are reconcilable (Brief in Opposition, p. 14) when the latter squarely and expressly contradicts the former on the very point at issue here.[2] The decision below holds that testing by either oral or written cross-examination and a known record are not essential to the ratemaking process and may be dispensed with as the Commission did below (and avowedly will do in the current national proceeding—Brief in Opposition, p. 15); while *Mobil* holds that these processes are essential and cannot be dispensed with even though full "formal rule-making" with a full adjudicatory hearing may not be required.

And although the Brief in Opposition argues that the issue "is of minimal present importance, because the Commission has determined for pending producer rate cases to employ procedures that would satisfy the requirements of both courts" (Brief in Opposition, p. 9), in fact the procedures announced by the Commission, omitting the right to cross-examination and to a known all-inclusive record, violate the very elements which *Mobil* holds indispensable:

> "A 'whole record,' as that phrase is used in this context, does not consist merely of the raw data introduced by the parties. It includes the process of testing and

2. "With all due respect, we disagree wtih the two majority judges in *Phillips* in their construction of the breadth of discretion granted the Commission to formulate rules. We agree with dissenting Judge Seth, who based his position in part on the failure of the procedures used by the Commission to create a record that would adequately support the factual findings and permit judicial review, a factor which plays a large part in our decision here" (*Mobil Oil Corporation v. Federal Power Commission*, supra, Appendix. Supplemental Brief in Support of Petition for a Writ of Certiorari, pp. 46-47, 483 F.2d at p. 1262).

> illumination ordinarily associated with adversary, adjudicative procedures. * * * Thus, it is adversary procedural devices which permit testing and elucidation that raise information from the level of mere inconsistent data to evidence 'substantial' enough to support rates" (*Mobil Oil Corporation v. Federal Power Commission,* Appendix, Supplemental Brief in Support of Petition for a Writ of Certiorari, p. 43; 483 F.2d at p. 1260),

and which have been repeated over and over by this Court:

Int. Com. Comm. v. Louis. & Nash. R. R. (1913) 227 U.S. 88, 93-94;

Ohio Bell Tel. Co. v. Comm'n (1937) 301 U.S. 292, 300;

Morgan v. United States (1936) 298 U.S. 468, 479-480;

West Ohio Gas Co. v. Comm'n (No. 1) (1935) 294 U.S. 63, 69.

While the *Mobil* court determined that oral cross-examination was not essential and that a form of written cross-examination might suffice, a conclusion with which we disagree, it left no doubt that the submission of "mere comments"[3] permitted in this case, on which the Solicitor General heavily relies (Brief in Opposition, p. 15) is inadequate:

> "Informal comments simply cannot create a record that satisfies the substantial evidence test. Even if controverting *information* is submitted in the form of comments by adverse parties, the procedure employed cannot be relied upon as adequate" (*Mobil Oil Corporation v. Federal Power Commission,* supra, Appendix, Supplemental Brief in Support of Petition for a Writ of Certiorari, p. 43, 483 F.2d at p. 1260).

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3. *Mobil Oil Corporation v. Federal Power Commission,* supra, Appendix, Supplemental Brief in Support of Petition for a Writ of Certiorari, p. 48, fn. 92, 483 F.2d at p. 1263, fn. 92.

In the present case, the procedure adopted by the Commission did not go beyond the submission of "mere comments." And, according to the Solicitor General, the Commission now intends to ignore the *Mobil* decision by following the same deficient procedures in setting rates for the entire nation in one vast rulemaking proceeding.

Semantics of "formal" and "informal" aside, the flat-out deprivation of all right of testing and exploration by cross-examination and of the right to be advised on the record of all data relied on by the Commission in making the judgments underlying its ratefixing process is the fundamental issue which divides the court below and the *Mobil* court.

These rights the court below has specifically denied. Though the Commission's procedures in *Mobil* were subject to additional infirmities, there is no denying that the *Mobil* court has established minimal requirements which the court below casts aside.

This issue is far from an abstraction (Brief in Opposition, p. 14). It is an issue of constitutional and statutory right which makes the difference between administrative regulation which is fully informed and equipped to meet the extreme exigencies of today, and an administrative absolutism immune from any effective judicial oversight and protection.[4]

Deprivation of a constitutional right in this manner is not excused because the end result of the administrative process would be "applicable across the board" to a number of parties rather than to a single one (Brief in Opposition.

4. "As the record stands, in reviewing the Commission's action we are unable to decide whether its factual determinations are supported by substantial evidence. Much of the evidence appears possibly suspect, we have no way of knowing from the record whether the figures are valid" (*Mobil Oil Corporation v. Federal Power Commission*, Appendix, Supplemental Brief in Support of Petition for a Writ of Certiorari, p. 42; 483 F.2d at p. 1259).

p. 10). In arguing the contrary, the Brief in Opposition strains *United States v. Florida East Coast R. Co.* (1973) 410 U.S. 224, beyond any fair interpretation of its words or its effect.

Most startling of all is the Opposition's reliance on the provision of § 15(b) of the Natural Gas Act[5] (Brief in Opposition, p. 12) that "No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule or regulation." To equate the denial of rights and processes so fundamental to constitutional protection as are the rights in issue here with mere "informality" is a perversion of statutory wording and intent which empties the Fifth Amendment of all substance.

The importance of settling this issue, which challenges long-accepted fundamentals of the administrative process, cannot be minimized.

The Brief in Opposition evades, rather than answers, the fundamental issue. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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